

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|------------------------|---|--------------------|
| RICHARD C. COPP |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| U.S.D. NO. 501 |) | Docket No. 211,211 |
| Respondent |) | |
| Self-Insured |) | |

ORDER

Respondent and claimant both appealed the January 8, 2001 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on June 20, 2001.

Appearances

F.G. Manzanares of Topeka, Kansas, appeared for claimant. Gregory J. Bien of Topeka, Kansas, appeared for respondent.

Record and Stipulations

The Appeals Board (Board) considered the record and adopts the stipulations listed in the Award. It is noted, however, that the preliminary hearing was heard on July 3, 1996 rather than the 1993 date shown in the Award.

Issues

This case involves a scheduled injury to claimant's lower leg. Judge Avery found the claim compensable and awarded permanent partial disability compensation based upon a five percent loss to the lower leg. Respondent denies claimant has proven that his

injury arose out of and in the course of his employment with respondent on October 13, 1993. But even if claimant did sustain accidental injury on that date, respondent denies any permanent impairment resulted from that accident. Furthermore, respondent disputes “. . . whether claimant’s future medical care should include treatment which is clearly not therapeutic according to qualified experts.”¹

Conversely, claimant contends his permanent partial disability award should be increased to a ten percent loss of use of the lower leg.

Findings of Fact and Conclusions of Law

After reviewing the entire record and having considered the briefs and arguments of counsel, the Board finds that the ALJ’s Award should be reversed and benefits denied.

Claimant alleges he injured his right lower leg on October 13, 1993, as he was trying to remove scuff marks from the floor by kicking a rag. Although claimant admits that he did not experience any pain at that time, later that evening after work, he had a very sharp pain in his right calf. Claimant was eventually diagnosed with thrombophlebitis, for which he has been receiving ongoing medical care.

It is significant that claimant had a prior workers compensation claim for a right knee injury. As a result of that injury, claimant underwent knee replacement surgery on June 2, 1993. That claim was settled by a lump sum compromise settlement on October 23, 1995.² That settlement was a strict compromise of all issues including the right to future medical benefits.³

Claimant was treated by his family physician, Glenn O. Bair, M.D. Dr. Bair is an internist but is not board certified in any speciality. Dr. Bair stated that claimant has a continuing and recurrent deep venous thrombosis (DVT) and that he will need to continue to take Coumadin, a blood thinner, for that condition for the rest of his life unless the thrombosis stop occurring. Although Dr. Bair said most DVTs do not occur from a defined cause and that he had no indication of what caused claimant’s DVT, including no indication that would point to the prior knee surgery, he also opined “That it is a reasonable

¹ U.S.D. 501 Application for Review by the Workers Compensation Appeals Board (filed Jan. 12, 2001).

² Depo. of Sharlys M. Kelly, Ex. 3 (Oct. 20, 2000).

³ Tr. of Prel. H., Ex. 5A (July 3, 1996).

probability that using [sic] of that tool with his foot caused a deep venous thrombosis.”⁴ Claimant gave Dr. Bair a history, however, which included claimant attributing an immediate onset of pain to his using his foot to scrap marks off the floor. It is not clear from Dr. Bair’s testimony whether a history of the onset of pain being later that evening would change the doctor’s causation opinion. But Dr. Bair did say that a serious deep venous thrombosis generated symptoms of inflammation and inflamed pain and is clinically obvious by pain, swelling and redness.⁵

Larry W. Rumans, M.D., specializes in internal medicine and infectious disease. He examined claimant on December 11, 1995. In his opinion claimant does not have DVT but diagnosed restless leg syndrome. In addition, Dr. Rumans does not believe that the cleaning of scuff marks could have been a traumatic cause of a DVT. Dr. Rumans also disagreed with Dr. Bair as to whether there was any value to claimant continuing to take Coumadin. Furthermore, it was his opinion that claimant did not have any type of permanent impairment. Although claimant’s medical records revealed a blood clot in his right leg in October 1993, Dr. Rumans was likewise not able to identify any causal relationship between claimant’s present complaints and his right total knee prosthesis operation.

Michael J. Schmidt, M.D., is a board certified orthopedic surgeon and also claimant’s treating physician for both the knee replacement surgery and also for claimant’s DVT. He first treated claimant for his right knee on March 23, 1993. He had treated claimant before that but not in connection with the knee or venous thrombosis. In his opinion, “It would be unlikely that moving the foot back and forth along the floor would cause a DVT.”⁶ Dr. Schmidt said that a DVT would be more likely attributable to prolonged standing or direct trauma. Dr. Schmidt likewise disagreed with Dr. Bair’s recommendation of Coumadin therapy for life and disagreed that there was any objective basis for Dr. Bair’s opinion that claimant was permanently disabled.

Maurice Cashman, M.D., specializes in hematology and medical oncology. He examined claimant on November 9, 1998, at the request of respondent. He explained that deep venous thrombophlebitis is a blood clot in the deep veins of an extremity. He found evidence of bilateral mild external varicose veins, but found no evidence that the kicking on the floor in October 1993 resulted in any permanent disability. Dr. Cashman said that even when there is a blood clot, the dilution of the clot results in a reconstitution of the blood flow through that vessel. Dr. Cashman could not envision claimant’s attempting to

⁴ Depo. of Glenn O. Bair, M.D., pp. 11-12, p. 68 (Jan. 5, 2000).

⁵ Depo. of Glenn O. Bair, p. 71 (Jan. 5, 2000).

⁶ Depo. of Michael J. Schmidt, p. 19 (Oct. 3, 1996).

remove scuff marks with his foot would produce changes in the lower extremity that would result in the formation of a blood clot. “I cannot envision any changes in blood flow engendered by that activity [kicking the floor to clean a mark off the floor] that would likely precipitate a deep venous thrombophlebitis.”⁷ He considered the most logical cause for claimant’s condition to be the natural aging process in varicose veins. He also noted that venous thrombosis is a recognized complication of joint replacement surgery. But Dr. Cashman said that it would be difficult to relate the thrombosis to the surgery because of the period of time elapsing between the two.

A court-ordered independent medical examination was performed by Peter V. Bieri, M.D., on March 29, 1999. As between the factors of the knee replacement surgery or of cleaning the floor, Dr. Bieri believed both contributed to claimant’s thrombophlebitis. Dr. Bieri rated claimant as having a ten percent permanent impairment to the lower extremity that he related to the October 13, 1993 incident. He attributed half of that impairment, however, to claimant’s preexisting condition.

The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.⁸ “‘Burden of Proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁹ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.¹⁰

To receive workers compensation benefits, the claimant must show a “personal injury by accident arising out of and in the course of employment.”¹¹ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.¹²

⁷ Depo. of Maurice Cashman, M.D., p. 9 (Aug. 27, 1999).

⁸ K.S.A. 44-501(a) (Furse 1993); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993); Box c. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁹ K.S.A. 44-508(g) (Furse 1993); see also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁰ K.S.A. 44-501(g) (Furse 1993).

¹¹ K.S.A. 44-501(a) (Furse 1993); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

¹² Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's services.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.¹³

The phrase "arising out of" employment requires some causal connection between the injury and the employment.¹⁴

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁵ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁶

¹³ Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

¹⁴ Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P.2d 197 (1956).

¹⁵ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

¹⁶ Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,¹⁷ the Court held:

When a primary injury under the Workman's compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injury. In *Stockman*,¹⁸ the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Nance*¹⁹ the Kansas Supreme Court held:

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, **every natural consequence** that flows from the injury, including a new and distinct injury, is compensable if it is a **direct and natural result** of a primary injury. (Emphasis added.)

Claimant argues the DVT is the direct result of his activities at work on October 13, 1993. The Board disagrees. When given an accurate history that includes an onset of symptoms after work, the greater weight of the credible medical opinion testimony clearly fails to support such a causal connection.

Based upon the claimant's own testimony concerning the onset of his symptoms and the greater weight of the medical evidence the Board finds the claimant has failed to prove that his DVT condition was caused by or contributed to by his work activities on October 13, 1993. Furthermore, the Board finds that the DVT condition did not cause

¹⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹⁸ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

¹⁹ *Nance v. Harvey County*, 263 Kan. 542, Syl. 4, 952 P.2d 411 (1997).

permanent impairment. The Board does not reach the question of whether the blood clot resulted from the knee replacement surgery as the parties entered into a final settlement of that claim.

WHEREFORE, it is the finding, decision, and order of the Board that the Award entered by Administrative Law Judge Brad E. Avery dated January 8, 2001, should be and is hereby reversed and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory J. Bien, Attorney for Respondent
F.G. Manzanares, Attorney for Claimant
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director